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In the Supreme Court of the United States

OCTOBER TERM, 1975

J. H. RUTTER REX MANUFACTURING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitoner brought this action against the United States under the Federal Tort Claims Act on July 19, 1971, claiming damages amounting to $128,313.49[1] for alleged negligent delay by the National Labor Relations Board in preparing two backpay specifications. The district court, on stipulated facts, held that the acts complained of came within the "discretionary function" exception of the Tort Claims Act, 28 U.S.C. 2680(a), and dismissed the complaint (Pet. App. 33-38). The court of appeals affirmed (Pet. App. 26-32). Petitioner's sole contention here is that the discretionary function exception did not bar its claim.

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[1]The claim was later increased to $144,001.24 (see Pet. App. 27).

The facts are not disputed. This case is a phase of protracted litigation arising out of a strike by employees at petitioner's New Orleans, Louisiana, clothing factory in 1954. The National Labor Relations Board in 1956 found that petitioner had refused to bargain and ordered petitioner to reinstate the striking employees. 115 NLRB 388. On June 10, 1957, the Board's order was enforced by the court of appeals. 245 F.2d 594 (C.A. 5). Immediately thereafter, the Board's office in New Orleans assigned the case to Edward Champagne, a compliance attorney, who worked on it for about 25 working days between June 1957 and May 1958. He had been instructed to work full time on other matters to gain experience. No other work was done on the case until August 31, 1959, when it was re-assigned. Thereafter it received regular attention. On November 16, 1961, a 428 page backpay specification was issued covering some 207 employees for the period from five days after the date of their application for reinstatement to June 1961. After an extensive hearing,[2] the Board in June 1966 ordered total backpay of $160,894 for 172 employees whom petitioner had refused to reinstate. In 1968, the court of appeals modified this order because of the Board's delay (399 F.2d 356 (C.A. 5)), but in December 1969 this Court reversed. *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co., Inc.*, 396 U.S. 258.

Thereafter, in November, 1970, the Board's regional office prepared a supplemental backpay specification for claims accruing after June 1961. In November 1971, the Board ordered supplemental backpay to 33 employees, in the aggregate amount of $53,078. The court of appeals enforced this order except for one remanded claim. 473 F. 2d 223 (C.A. 5). This Court denied certiorari. 414 U.S. 822.

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[2]Petitioner unsuccessfully sought to enjoin those proceedings. 305 F. 2d 292 (C.A. 5).

In July 1971, petitioner commenced the present action against the United States under the Federal Tort Claims Act, contending that it had sustained damages in the amount of $75,309 as a result of delay by the Board in issuing its November 1961 backpay specification, and $53,004 (plus interest) as a result of delay in the November 1970 backpay specification.[3]

The courts below correctly held that the alleged unreasonable delay by the National Labor Relations Board came within the exception in the Tort Claims Act for "[a]ny claim * * * based upon the exercise or * * *failure to exercise * * * a discretionary function * * * whether or not the discretion involved be abused." 28 U.S.C. 2680(a). When and how to devote limited resources to a particular investigation is clearly a "determination made by executives or administrators in establishing plans, specifications or schedules of operations." *Dalehite* v. *United States*, 346 U.S. 15, 35-36, 42. The decision below does not conflict with that of any other court of appeals. The few other cases discussing the issue have reached the same result. *E.g., Coastwise Packet Co.* v. *United States*, 398 F. 2d 77 (C.A. 1), certiorari denied, 393 U.S. 937. See also *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1010-1011 (Ct. Cl.).[4]

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[3]These figures were later changed to $108,913.99 and $35,087.25, respectively.

[4]Petitioner's reliance (Pet. 11-12) on the requirement in the Administrative Procedure Act that agencies act within a reasonable time (5 U.S.C. 555(b)) is misplaced. The question here is whether the timing of the agency's compliance action is discretionary, not whether the agency complied with Section 555(b). See *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co., Inc., supra*, 396 U.S. at 266 n. 3. The remedy for unreasonable delay in agency action is by a proceeding under 5 U.S.C. 706(1).

As the court of appeals explained (Pet. App. 31; footnote omitted):

> The evidence indicated that the New Orleans NLRB office was understaffed during the relevant period. The Board elected to have new and inexperienced member Champagne "cut his teeth" on smaller compliance matters before handling the Rutter Rex case, a major back pay case. This decision clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest. The NLRB could clearly have thought it was in the public interest to have Champagne gain experience before taking on the Rutter Rex case to insure full compliance with the back pay order in that major case. Thus the trial court correctly held that the discretionary function exception applied even if the NLRB abused its discretion in this case. See 28 U.S.C. §2680(a).[5]

This analysis is firmly grounded in considerations of public policy. As the district court noted in its opinion, "the creation of tort liability on the part of the government for delay by its agencies in carrying out their functions would open our already overloaded federal courts to a very substantial number of disgruntled citizens seeking damages for delays of as many sorts as could be conjured up in the minds of ingenious lawyers" (Pet. App. 37, n. 7).

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[5]The court need not consider petitioner's contention that there are two interpretations of the discretionary function exception, since, under any theory, the assignment of limited personnel to deal with a heavy case load is a discretionary planning function. Compare the *ad hoc* balancing test applied by the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, with the Fifth Circuit's analysis in this case.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.